

impose a condition on such approval as to the territorial areas within Davidson County served by Tennessee Telephone Company and United Telephone Company.

2. The approval of its franchise authorizes Hyperion to provide telecommunications services in Davidson County without the granting of a certificate of convenience and necessity. The operations of Hyperion within Davidson County are as fully subject to the regulatory authority of this Commission as those of any other telecommunications service provider.

3. The parties in this matter shall submit briefs as to the reserved issues by Thursday, July 20, 1995; and the Commission will decide those issues on the basis of the record in this matter without further hearing.

4. A certificate of convenience and necessity is granted to Hyperion to provide telecommunications services as a Competing Telecommunications Provider in territories served by BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company in Williamson, Rutherford, Wilson, Sumner, Robertson, Cheatham, and Maury Counties.

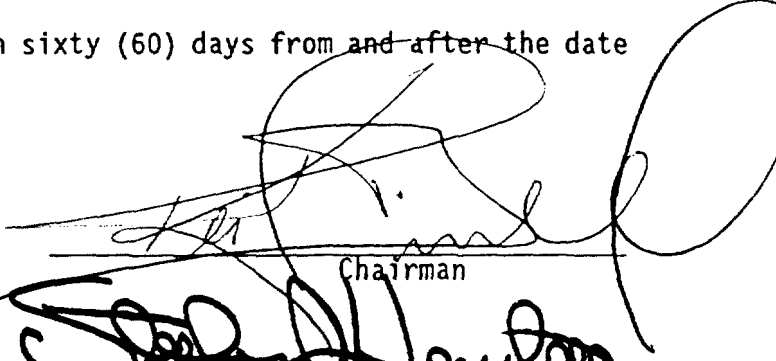
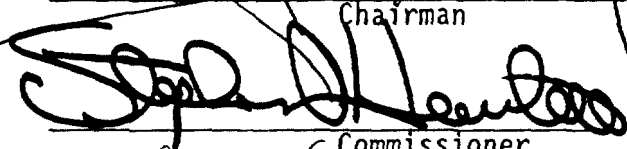
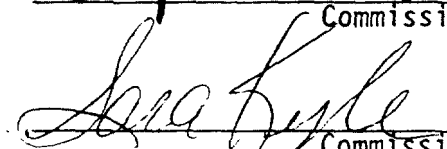
5. A certificate of convenience and necessity is granted to Hyperion to provide telecommunications services as a Competing Telecommunications Provider throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state.

6. Nothing in this Order shall be construed as granting authority to provide telecommunications services in any area served by a telephone cooperative.

7. AVR, L.P., d/b/a Hyperion of Tennessee, L.P., may commence service pursuant to this Order when it has filed proper tariffs for services to be offered and is otherwise in compliance with all applicable Commission rules and regulations.

8. Any party aggrieved with the Commission's decision in this matter may file a petition to reconsider with the Commission within ten (10) days from and after the date of this Order.

9. Any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a petition for review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.


Chairman

Commissioner

Commissioner

ATTEST:


Executive Director

EXHIBIT C

**ORDER PROHIBITING HYPERION FROM PROVIDING SERVICE IN AREAS
SERVED BY INCUMBENT LECS WITH FEWER THAN 100,000 ACCESS LINES**

Copy to Wisconsin
3/13/96

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

Nashville, Tennessee

March 8, 1996

IN RE: THE APPLICATION OF ICG ACCESS SERVICES, INC.
(FORMERLY TELEPORT-DENVER, INC.) FOR A CERTIFICATE
OF CONVENIENCE AND NECESSITY TO PROVIDE
INTRASTATE PRIVATE LINE AND TELECOMMUNICATIONS
ACCESS SERVICE WITHIN THE STATE OF TENNESSEE.

Docket No. 93-07922

IN RE: THE APPLICATION OF MCI METRO ACCESS
TRANSPORTATION SERVICES, INC. (FORMERLY KNOWN AS
ACCESS TRANSMISSION SERVICES, INC.) FOR A
CERTIFICATE OF CONVENIENCE AND NECESSITY TO
PROVIDE INTRASTATE PRIVATE LINE SERVICES,
TELECOMMUNICATIONS ACCESS SERVICES, SWITCHED
LOCAL EXCHANGE SERVICES, AND CARRIER ACCESS
SERVICES.

Docket No. 93-08793

IN RE: THE APPLICATION OF AVR, L.P. D/B/A HYPERION OF
TENNESSEE. L.P. FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE
POINT-TO-POINT AND TELECOMMUNICATIONS ACCESS
SERVICE WITHIN THE STATE OF TENNESSEE.

Docket No. 94-00661

ORDER

This matter is before the Tennessee Public Service Commission upon its
own motion, having reserved the issues set forth below in the above dockets
and having requested those issues be briefed.

EXHIBIT

2

The following attorneys appeared in the above said dockets and/or prepared briefs on the pertinent issues.

APPEARANCES:

JON HASTINGS, Attorney at Law, Boulton, Cummings, Connors & Berry, Suite 1600, 414 Union Street, Nashville, Tennessee 37219, appearing on behalf of MCI Metro Access Transmission Services, Inc.

MARTHA MCMILLIN, Attorney at Law, 780 Johnson Ferry Road, Suite 700, Atlanta, Georgia 30342, appearing on behalf of MCI Metro Access Transmission Services, Inc.

VAL SANFORD and JOHN KNOX WALKUP, Attorneys at Law, Gullett, Sanford, Robinson & Martin, P.O. Box 198888, Nashville, Tennessee 37219-8888, appearing on behalf of AVR, L.P., d/b/a Hyperion of Tennessee, L.P.

CHARLES HOWORTH, Attorney at Law, South Central Bell Telephone Company, 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300 appearing on behalf of South Central Bell Telephone Company.

JAMES HARRELSON and JACQUE SHAIA, Attorneys at Law, South Central Bell Telephone Company, 3535 Colonnade Parkway, Birmingham, Alabama 35203, appearing on behalf of South Central Bell Telephone Company.

JOHN KENNEDY, Attorney at Law, Metropolitan Government, Department of Law, Room 204, Metro Courthouse, Nashville, Tennessee 37201, appearing on behalf of the Metropolitan Government of Nashville and Davidson County.

T.G. PAPPAS and JOE WELBORN, Attorneys at Law, Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, appearing on behalf of Tennessee Telephone Company and United Telephone Company, and the Tennessee Telephone Association.

D. BILLYE SANDERS, Attorney at Law, Waller, Lansden, Dortch & Davis, 511 Union Street, Suite 2100, Nashville, Tennessee 37219, appearing on behalf of ICG Access Services, Inc., formerly Teleport Denver.

VINCENT WILLIAMS and DAVID YATES, Attorneys of the Consumer Advocate Division, Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243, appearing in the interest of Tennessee consumers.

JEANNE MORAN, General Utility Counsel, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505, appearing on behalf of the Commission Staff.

The Public Service Commission in granting ICG Access Services, Inc., MCI Metro Access Transportation Services, Inc., and AVR, L.P. d/b/a Hyperion of Tennessee. L.P. certificates of convenience and necessity, reserved two issues for further consideration:

1. THE COMPETITION ISSUE: Whether certificate holders should be allowed to automatically serve the territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee, when statutory conditions under which competition in these areas would be permitted were met, or whether application for specified authorization to serve these areas would be required.
2. THE FRANCHISE ISSUE: Whether the Commission has the power to impose conditions upon franchise approvals.

THE COMPETITION ISSUE

On June 6, 1995, the Tennessee Legislature enacted Chapter 408 of the Public Acts of 1995, substantially altering Tennessee Code Annotated Title 65, Chapter 4, Parts 1 and 2, and Chapter 5, Part 2, regarding the regulation of telecommunications service providers by the Public Service Commission. Specifically, T.C.A. §65-4-201 was amended as follows:

- b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or

provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Commission a certificate of convenience and necessity for such service or territory; provided, however that no Telecommunications Services Provider offering and providing a Telecommunications Service under the authority of the Commission on the effective date of this act shall be required to obtain additional authority in order to continue to offer and provide such Telecommunications Services as it offers and provides as of such effective date.

c) After notice to the Incumbent Local Exchange Telephone Company and other interested parties and following a hearing, the Commission shall grant a certificate of convenience and necessity to a Competing Telecommunications Service Provider if after examining the evidence presented, the Commission finds:

(i) The applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and

(ii) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

d) Subsection (c) shall not be applicable to areas served by an Incumbent Local Exchange Telephone Company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider or unless such Incumbent Local Exchange Telephone Company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider to serve an area already served by a small Incumbent Local Exchange Telephone Company unless one of two conditions are met:

- 1) the incumbent local exchange company voluntarily entered into an interconnection agreement with a competing telecommunications service provider; or
- 2) the incumbent local exchange company applied for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of the legislation.

Chapter 408 declares that those areas should be protected from competition until the incumbent LEC either "...voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider" or the incumbent LEC "...applies for a certificate to provide telecommunications services in an area outside its service area."

In other words, should a small incumbent carrier voluntarily elect to enter into telecommunications competition, Competing Telecommunications Service Providers may provide service in that carrier's territory. There should be no dispute over whether an incumbent LEC has opened the door to competition. The LEC has either entered into an interconnection agreement with a competing carrier or it has not. Similarly, the small carrier either has applied for a certificate in an area outside its service area or it has not. Should either of these two events occur, a Competing Telecommunications Service Provider could file a revised tariff to provide service in the incumbent's territory without having to apply to the Public Service Commission for an amended certificate and without the necessity of a hearing. The necessity for a hearing would be inefficient and wasteful of both the Commission's and the carrier's resources.

Competing Telecommunications Service Providers should be required to file revised tariffs whenever entrance into new service territory is contemplated. The amended tariff should explain whether the incumbent LEC has signed an interconnection agreement or applied to serve other areas. Should the incumbent LEC dispute the tariff, it could file an objection and request a hearing before the Public Service Commission.

THE FRANCHISE ISSUE

The last issue reserved for determination is whether the Tennessee Public Service Commission has the power to impose conditions upon franchise approvals. T.C.A. §65-4-107 is set forth below:

65-4-107. Approval of privilege or franchise. — No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by the commission, such approval to be given when, after hearing, the commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the commission shall have the power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require; provided, that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a certificate of convenience from the commission for such purpose. [Emphasis added].

The statute is unequivocal and states that certain conditions may be imposed upon franchises by the Public Service Commission. The Commission may impose conditions that relate to construction, equipment, maintenance,

service or operation as long as such conditions are reasonably in the public interest.

WHEREFORE, having considered the briefs and the statutory criteria, the Commission finds that certificate holders of statewide authority need not file a new application with the Commission to serve territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee when statutory conditions under which competition in these areas would be permitted are met. The Commission also finds it has the power to impose certain conditions upon franchise approvals.

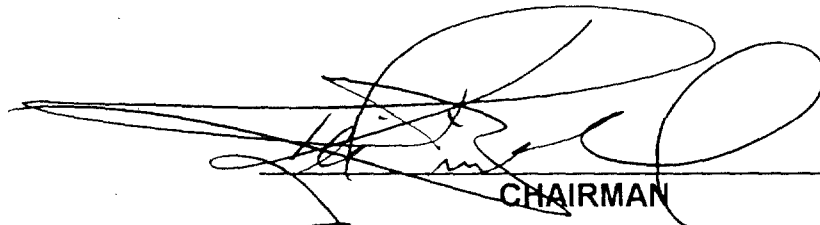
IT IS THEREFORE ORDERED:

1. That certificate holders of statewide authority need not file new applications with the Tennessee Public Service Commission to serve territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee when statutory conditions under which competition in these areas would be permitted are met.

2. That the Tennessee Public Service Commission has the power to impose conditions relating to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require.

3. That any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this Order.

4. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.


CHAIRMAN
COMMISSIONER
COMMISSIONER

ATTEST:



EXECUTIVE DIRECTOR

EXHIBIT D

**HYPERION'S APPLICATION TO PROVIDE SERVICE IN TENNESSEE
TELEPHONE'S SERVICE TERRITORY**

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re: *AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application For a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*

Docket No: _____

APPLICATION

AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, and pursuant to TENN. CODE ANN. § 65-4-201(b), hereby requests a Certificate of Public Convenience and Necessity to extend its territorial area of operations to include the areas currently served by Tennessee Telephone Company.

I. Summary of Requests

- 1) Hyperion requests an extension of its Certificate of Public Convenience and Necessity to provide service in the service area of Tennessee Telephone Company.
- 2) As discussed below, federal law, including recent FCC precedent, makes it clear that any state statute precluding competition in a particular territory is preempted; and therefore, Hyperion cannot be precluded from providing a competitive service in the territory served by Tennessee Telephone Company.
- 3) Hyperion expects that Tennessee Telephone Company will comply with its obligations set forth in Sections 251(a) and 251(b) of the Telecommunications Act of 1996.
- 4) By this application, and at this time, Hyperion is not requesting that Tennessee Telephone Company offer Hyperion the heightened obligations set forth in Section 251(c) ("1996 Act").

II. Background

On August 24, 1995, the Tennessee Public Service Commission ("TPSC") granted Hyperion a Certificate of Public Convenience and Necessity to provide telecommunications services throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state.¹ In granting this certificate, the TPSC specifically found that Hyperion possesses the requisite technical, managerial, and financial qualifications to render local exchange telecommunications services throughout the state of Tennessee, and met the requirements of T.C.A. §65-4-201. However, constrained by statutory limitations, the TPSC granted Hyperion a certificate to compete only in those areas of Tennessee which are currently served by entities that have 100,000 or greater access lines in this state. As these statutory limitations are no longer applicable to Hyperion under existing law, Hyperion hereby requests authority to provide service in the areas within Tennessee currently served by Tennessee Telephone Company.

Tennessee Telephone Company is a wholly owned subsidiary of TDS Telecommunications Corporation ("TDS Telecom"), which in turn is a wholly owned subsidiary of Telephone & Data Systems, Inc., a publicly traded corporation having annual revenues in

¹ *In re: The Application of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Service Within the State of Tennessee*, Order, Docket No. 94-00661, dated August 24, 1995 ("Hyperion Certification Order", copy is attached as Exhibit 1). In that order the TPSC reserved the question as to whether Hyperion would be authorized to serve that part of Davidson County served by Tennessee Telephone Company and United Telephone Company. Subsequently, on March 8, 1996, the TPSC entered an order holding that T.C.A. §65-4-201 restricts its authority to grant a certificate to a competing telecommunications service provider to serve an area served by an incumbent local exchange telephone company under the conditions specified in the statute; (copy of TPSC Order attached as Exhibit "2").

excess of \$1 billion. TDS Telecom operates 105 telephone companies which serve approximately 493,000 access lines in 28 states, including Concord, Humphreys County, Tellico and Tennessee Telephone Companies, serving approximately 67, 331 residential and 19,478 business customers. Tennessee Telephone Company operates in Tennessee as an incumbent local exchange telephone company with exchanges located at LaVergne, Mt. Juliet, Clifton, Cornersville, Darden, Lobelville, Sardis, Collinwood, Decaturville, Linden, Scotts Hill and Bruceton. It provides service to approximately 45,121 residential and 11,665 business customers.

III. Tennessee Law

On June 6, 1995, prior to the enactment of the 1996 Act,² the Tennessee Legislature enacted Chapter 408 of the Public Acts of 1995. Specifically, the Tennessee Legislature amended Section 65-4-201, to provide that

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee Regulatory Authority a certificate of convenience and necessity for such service or territory...

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

² See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*) ("1996 Act").

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

Constrained by Section 65-4-201, the TPSC authorized Hyperion to compete only in those areas of Tennessee currently served by entities that have 100,000 or greater access lines. According to the TPSC, "should an incumbent carrier voluntarily elect to enter into telecommunications competition, Competing Telecommunications Service Providers may provide service in that carrier's territory."³ More specifically, the Order stated that:

should a small incumbent carrier elect to enter into telecommunications competition, Competing Telecommunications Service Providers may provide service in that carrier's territory. There should be no dispute over whether an incumbent LEC has opened the door to competition. The LEC has either entered into an interconnection agreement with a competing carrier or it has not. Similarly, the small carrier either has applied for a certificate in an area outside its service area or it has not.

On October 13, 1997, Hyperion formally requested that Tennessee Telephone Company engage in interconnection negotiations with Hyperion for Hyperion's provisioning of telecommunications services in Tennessee Telephone Company's service territory. Tennessee Telephone Company refused Hyperion's interconnection request, stating only that Hyperion's Certificate of Public Convenience and Necessity does not permit Hyperion to provide telecommunications services in Tennessee Telephone Company's service area. In addition, Hyperion has been unable to successfully negotiate a mutual traffic exchange agreement with

³ Hyperion Certification Order at 5.

Tennessee Telephone Company.

IV. The FCC's Silver Star Decision

On September 24, 1997, the Federal Communications Commission ("FCC") issued its *Silver Star*⁴ decision, in which the FCC preempted a provision of the Wyoming Telecommunications Act of 1995 ("Wyoming Act") that empowers certain incumbent LECs to prevent competitors from receiving a certificate of public convenience and necessity to provide service in their territory. In *Silver Star*, the FCC also preempted an order of the Wyoming Public Service Commission ("Wyoming PSC") enforcing the provision of the Wyoming Act.

Factual Background. Silver Star is an incumbent LEC certificated to provide local exchange service in western Wyoming. Silver Star applied to the Wyoming PSC to become certificated to provide local exchange service in nearby Afton, Wyoming. The incumbent LEC serving Afton opposed Silver Star's application. The Wyoming PSC denied Silver Star's application, relying exclusively on a provision in the Wyoming Act which provides that

Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall, after notice and opportunity for hearing, issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if, the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which certification is sought and the incumbent local exchange service provider: (i) Consents to a concurrent certificate; or (ii) Is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought; or (iii) Fails to protest the application for the certificate after notice and opportunity for hearing; or (iv) Has applied for and received a concurrent certificate to provide competitive local

⁴ *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1 (Sep. 24, 1996) ("*Silver Star*"), Copy attached as Exhibit 3.

exchange telecommunications services in any area of this state.⁵

Silver Star petitioned the FCC to preempt this provision of the Wyoming Act, and the Wyoming PSC's order denying its certification application (the "*Denial Order*"). Pursuant to its statutory authority under Section 253(d) of the 1996 Act, the FCC preempted both. In keeping with the direction of Section 253(d) to preempt only "to the extent necessary," the FCC did not order the Wyoming PSC to grant Silver Star's certification application. However, the FCC stated that it "expect[s] that the Wyoming Commission will promptly respond to any request by Silver Star to reconsider Silver Star's application for a concurrent CPCN to serve the Afton exchange consistent with the Communications Act and our decision to preempt the enforcement of the *Denial Order* and the Wyoming Act's rural incumbent protection provision."⁶

The FCC's Rationale. In assessing whether to preempt the *Denial Order* and the incumbent protection provision of the Wyoming Act, the FCC first considered Section 253(a) of the 1996 Act, which provides that

No state or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

In holding that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC noted that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."⁷ An absolute prohibition on competitive entry "is precisely the type of action

⁵ WYO. STAT. ANN. § 37-15-201(c) (1995) (emphasis added).

⁶ *Silver Star* at ¶ 47.

⁷ *Silver Star* at ¶ 38.

Congress intended to proscribe under Section 253(a).”⁸

Having determined that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC next examined whether the provision falls within Section 253(b)’s exception to Section 253(a)’s proscriptions. The FCC noted that “Section 253(b) preserves a State’s authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) ‘competitively neutral’; (ii) consistent with the Act’s universal service provisions; and (iii) ‘necessary’ to accomplish certain enumerated public interest goals.”⁹ The FCC found “that the rural incumbent protection provision is not competitively neutral...the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry.”¹⁰

V. Subsequent State Action

On October 1, 1997, the State of Vermont Department of Public Service (the “Vermont DPS”) issued its recommended decision that the Vermont Public Service Board (the “Vermont Board”) repeal its existing incumbent protection policy, since the policy is invalid under the *Silver Star* precedent.¹¹

Vermont’s incumbent protection provision prohibited Hyperion from competing in the

⁸ *Silver Star* at ¶ 39.

⁹ *Silver Star* at ¶ 40.

¹⁰ *Silver Star* at ¶ 42.

¹¹ Letter from Sheldon M. Katz, Special Counsel, *The Vermont Department of Public Service*, to Frederick W. Weston, Hearing Officer, *The Vermont Public Service Board* (Oct. 1, 1997) (on file with the Vermont Public Service Board) (“Vermont DPS Letter”). A copy of this Resolution is attached as Exhibit 4.

service area of a Vermont rural telephone company until one year after Hyperion provides notice of its intention to compete in such areas. In granting a Certificate of Public Good¹² to Hyperion in 1997, the Vermont Board conditioned Hyperion's certificate on compliance with Vermont's incumbent protection provision. In its recommendation to the Vermont Board, the Vermont DPS stated that "*Silver Star* holds that absolute prohibitions on new entry into areas of a state served by rural telephone companies ("RTCs"), such as the current prohibition placed on Hyperion barring its entry into areas served by Vermont RTCs until one year after it provides notice of its intent to do so, violate the federal Telecommunications Act of 1996."¹³ Furthermore, the Vermont DPS stated that the issue

is not only whether the current prohibition on Hyperion's certificate should be removed but whether the Board should refrain from placing similar prohibitions on the certificates issued to other new entrants. *Silver Star* resoundingly answers that question in the affirmative. The Board should therefore refrain from prohibiting or delaying competition by new entrants in RTC service areas.¹⁴

VI. Specific Obligations Under the 1996 Act of Concurrently Certificated Carriers

Section 251(a) of the 1996 Act states that each telecommunications carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," and the duty "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established" by the 1996 Act.¹⁵ Section 251(b) provides for the following:

¹² The equivalent of a Certificate of Public Convenience and Necessity in Tennessee.

¹³ Vermont DPS Letter at 2.

¹⁴ Vermont DPS Letter at 4-5.

¹⁵ 47 U.S.C. § 251(a) (1996) (emphasis added).

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.--Each local exchange carrier has the following duties:

(1) RESALE.--The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY.--The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY.--The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF WAY.--The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION.--The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The plain language of Section 251(a) imposes a general duty on "each telecommunications carrier," and Section 251(b) imposes an obligation on "each local exchange carrier." Thus, both Hyperion and Tennessee Telephone Company have the obligation to provide each other with interconnection, resale, number portability, dialing parity, and access to rights-of-way.

VII. The Rural LEC Exemption

Silver Star makes clear that Section 251(f) of the 1996 Act was designed only to provide small or rural incumbent LECs with certain relief from the requirements of Section 251(c). Specifically, 251(f) states that

(f) EXEMPTIONS FOR CERTAIN RURAL TELEPHONE COMPANIES.--

(A) EXEMPTION.--Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State Commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254....

Hyperion is requesting certification, not interconnection under Section 251(c). By this application, and at this time, Hyperion is not requesting that the TRA terminate any small or rural

LEC exemption that Tennessee Telephone Company may claim. Rather, Hyperion is merely requesting that its existing Certificate of Public Convenience and Necessity be extended to allow Hyperion to compete in the service area of Tennessee Telephone Company, in accordance with the current state of the law. To the extent that the rural LEC exemption is applicable (which Hyperion does not concede), only Tennessee Telephone Company's obligations to provide certain services or facilities would be implicated, but would in no way have any impact on the TRA's obligation to allow Hyperion to provide service. Obviously, both Hyperion and Tennessee Telephone Company will be required to comply with the obligations set forth in Sections 251(a) (which applies to all telecommunications carriers) and 251(b) (which applies to all local exchange carriers).

At this time, however, Hyperion is not requesting that Tennessee Telephone Company be required to comply with the obligations of incumbent local exchange carriers set forth in Section 251(c). More specifically, Hyperion is not requesting that Tennessee Telephone Company provide Hyperion with the heightened interconnection requirements of Section 251(c)(2), or that Tennessee Telephone Company make available to Hyperion unbundled access to Tennessee Telephone Company's network elements, as described in Section 251(c)(3). Furthermore, Hyperion is not requesting that the TRA require Tennessee Telephone Company, under Section 251(c)(4), to offer for resale at wholesale rates Tennessee Telephone Company's retail services, or that Hyperion be allowed to collocate facilities on Tennessee Telephone Company's premises, as discussed in Section 251(c)(6). As stated previously, Hyperion is merely requesting that it be authorized to provide service in Tennessee Telephone Company's service area, and that both parties be bound by the obligations of Section 251(a) and 251(b).

VIII. Public Interest Considerations

The Tennessee Legislature, in its declaration of telecommunications services policy stated

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.¹⁶

Grant of this Application will further the goals of the Tennessee Legislature and further the public interest by expanding the availability of competitive telecommunications services in the State of Tennessee. In addition, intrastate offering of these services is in the public interest because the services will provide Tennessee customers with access to new technologies and service choices and can permit customers to achieve increased efficiencies and cost savings. Extension of Hyperion's existing authority to provide local exchange telecommunications services will enhance materially the telecommunications infrastructure in the State of Tennessee and will facilitate economic development.

In particular, the public will benefit both directly, through the use of the competitive services to be offered by Hyperion, and indirectly because the presence of Hyperion in Tennessee Telephone Company's service area will increase the incentives for other telecommunications providers to operate more efficiently, offer more innovative services, reduce

¹⁶ TENN. CODE ANN. § 65-4-123.

their prices, and improve their quality of service. Grant of this Application will enhance further the service options available to Tennessee citizens for the reasons set forth above.

IX. Conclusion

Hyperion's existing Certificate of Public Convenience and Necessity states that in the event that a small or rural LEC voluntarily opens the door to competition, "Hyperion could file a revised tariff to provide service in the incumbent's territory without having to apply to the [TRA] for an amended certificate and without the necessity of a hearing. The necessity for a hearing would be inefficient and wasteful of both the [TRA's] and the carrier's resources."¹⁷ Since Tennessee Telephone Company has not voluntarily agreed to allow Hyperion to compete in its service territory, this precondition has not been met, thus the need for Hyperion to formally file this Application for an extension of its certificate to provide service in Tennessee Telephone Company's service area. Furthermore, as discussed in this Application, Hyperion requests, at this time, that Tennessee Telephone Company and Hyperion comply only with the obligations set forth in Sections 251(a) and 251(b) of the 1996 Act, and does not request that be required to comply with the additional obligations of incumbent local exchange carriers set forth in Section 251(c).

For the foregoing reasons, AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., hereby requests that the Tennessee Regulatory Authority grant an extension of Hyperion's Certificate of Public Convenience and Necessity, and enter an order authorizing Hyperion to compete in the service territory of Tennessee Telephone Company, in furtherance of federal and Tennessee law.

¹⁷ Hyperion Certification Order at 5.



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CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a true and exact copy of the foregoing Application of AVR of Tennessee, L.P. d/b/a Hyperion has been served via First Class Mail, postage prepaid, this 2nd day of January, 1998, as follows.



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